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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

In Re: Michael J. Tharaldson Irrevocable Trust II dated October 3, 2011

Bell Bank, as Trustee of the Michael J. Tharaldson Irrevocable Trust II dated October 3, 2011

Petitioner-Appellee

vs.

Matthew D. Tharaldson and Michelle Tharaldson LeMaster

Respondents-Appellees

vs.

E.M., through his guardian, Mark McAllister,

Respondent(s)-Appellant(s).

Supreme Court No. 20210139

Civil No. 09-2019-CV-02259
(Cass County District Court)

REPLY BRIEF OF APPELLANT E.M.
"ORAL ARGUMENT REQUESTED"

APPEAL FROM ORDER GRANTING PETITION FOR DETERMINATION OF BENEFICIARY AND APPROVAL OF DISTRIBUTION OF TRUST ASSETS OF THE DISTRICT COURT ENTERED ON APRIL 22, 2021, AND ANY UNDERLYING ORDERS

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN E. McCULLOUGH

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[¶1] **ISSUES ON APPEAL**

[¶2] Without appealing or expressing dissatisfaction, Bell Bank, as Trustee of the Michael J. Tharaldson Irrevocable Trust II dated October 3, 2011 [hereinafter "Bell Bank"] and Matthew D. Tharaldson [hereinafter "Matthew"] identify issues on appeal, sometimes perverting law and fact. Matthew overlooks the need for personal jurisdiction over all interested parties [Matthew's Brief, ¶1], the district court never held "the issue of the modification and/or merger of Trust I into Trust II were irrelevant ["Matthew's Brief, ¶2], and the law actually does support E.M.'s expectation that "the court must find the facts specially and state its conclusions of law separately." Matthew's Brief, ¶3; N.D.R.Civ.P. 52(a). Bell Bank perpetrates error/confusion (Brief, ¶s 2, 3) by wrongfully suggesting that "ten (10) days after the appearance by the party's attorney" is a statutory time limitation imposed by N.D.C.C. § 29-15-21 and/or there never has been "(..)litigation of a claim regarding beneficiary status under a Trust", so "relitigation" is impossible.

[¶3] **STATEMENT OF THE CASE**

[¶4] Bell Bank erroneously asserts the content of the May 25, 2018, Order in probate court [App. ps. 85-101] claiming, "(t)he Court necessarily determined in the same Order that minor E.M. .. was not a beneficiary of (either Trust II or Trust I)." Brief, ¶6. Without honoring all facts, or law, the lower court clearly recognized E.M. as "hav(ing) been a contingent beneficiary of these Trusts .." App., p. 96. The "contingency" was actually Michael's death, not a term in a Will, and no "hearing" was held on September 4, 2019, only a"status conference". Transcript of 9/4/2019. In equity, a hearing corresponds to the trial of an action

at law, and it may be interlocutory (as to preliminary questions) or final. Akerly v. Vilas, 24 Wis. 165, 171 (1869), 1 Am.Rep. 166; see also, Black's Law Dictionary, Second Edition, 1910. E.M. used the Court's "status conference" to recognize, and announce, Bell Bank's inadequate service. Matthew made similar misrepresentations, "with all parties represented". Matthew's Brief, ¶ 16. However, Michelle Tharaldson LeMaster was never served [until after appeal], and only recently started participating. Supreme Court Docket #30.

[¶5] **STATEMENT OF FACTS**

[¶6] Bell Bank falsely represents "(t)here were no substantive changes to the beneficiaries of, or the beneficiaries' interests in, the Trust under Trust II" as compared to Trust I. Bell Bank Brief, ¶11. E.M. fully understands Trust II, now erroneously validated by the district court, precludes him from benefitting as a descendant of Michael because there is no known "valid testamentary instrument that expressly refers to this special power of appointment". Under Trust I, E.M. is "issue", a "descendant" [defined by Michael as "synonymous terms"[1]], and specifically named as being a surviving child. App., p. 142; citing Trust I's Article 2 at ¶s 9 & 10(a) [Trust II identical -App., p. 142]. Trust I and Trust II each include Michael's directive in the form of a "Protective Provision()" in Article Seven (App., p. 162 - Trust I;

[1] In Appellant's Brief, at ¶ 43, the undersigned wrote (error in *italics*), "I have intentionally limited gifts to my *descendants* to those provided in this instrument." The correct word is "**issue**", not descendants. I apologize to the Supreme Court, and other counsel. I am sure Michael would have accepted my apology, as he defined them as "synonymous terms" (App., ps. 115,142), as does N.D.C.C. § 30.1-01-06(10) & (27). E.M.'s status as an "heir" or "child" or "interested person" or "issue" or "descendant" has never been the subject of any dispute in the probate court. N.D.C.C. § 30.1-01-06(6 - child)(10 - descendant)(23 - heir)(26 - interested person)(27 - issue).

135 - Trust II) , always ignored by Bell Bank or Matthew[2]:

> d. Provision for Issue. I have intentionally limited gifts under this Agreement to my *issue* as defined in this Agreement. (*emphasis* added)

[¶7] Matthew, or his sister, Michelle Tharaldson LeMaster, are *siblings* used to avoid escheat; they are never "issue" nor "descendants" of Michael.

[¶8] Without attribution to this record, Bell Bank makes numerous representations of fact at ¶ 14 (probate court proceedings), and Matthew does likewise: ¶s 28-29 (family circumstances), 32 (creation of only two (2) trusts), 33 (asset description; the only evidence provided was the Trustee's testimony that all Trust II assets came from Trust I; see Transcript of December 5, 2019, pages 20-23; see Appellant's Brief, ¶ 24).

[¶9] Matthew cites the district court's comments as authority, not the evidence in the record. Brief, ¶s 34, 35, 40. Michael's failure to secure consents of contingent beneficiaries required by law should not be exulted. See, Appellant's Brief, ¶ 50 noting consent of all beneficiaries is necessary,[3] and limiting Michael's ability to represent his children in the process based on N.D.C.C. § 59-12-11 and N.D.C.C. § 59-11-03. Even the lower court recognized "all the beneficiaries should have been notified and Michael's children have what appears to be a facially recognizable claim." App., p. 100; ¶ 26.

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[2] Matthew cites this language as being a "fact" at ¶ 42 of his Brief.

[3] Matthew, conceding lack of E.M.'s consent to the merger, argues at ¶ 120 that Michael "did not recognize his children as contingent beneficiaries of the Trusts as no consent was signed on their behalf to merge the Trusts." Michael has no ability to disregard law after he made them beneficiaries of his irrevocable trust, nor can Michael represent E.M. and waive the conflict of interest when eliminating E.M.'s contingent share (or the share of any sibling). N.D.C.C. § 59-11-03.

[¶10] At ¶ 36 of his Brief, Matthew also erroneously attributes the judicial findings to both Trust I and Trust II. The lower court addressed Trust II's terms. App., ps. 201-202; ¶s 2-4.

[¶11] At ¶ 41, Matthew asserts theories as facts. Under Trust I and Trust II, E.M. is always a contingent beneficiary prior to Michael's death; only under Trust II is E.M. a contingent beneficiary requiring two (2) contingencies: (1) death of Michael; and (2) a valid testamentary document referencing a special power of appointment.

[¶12] Contrary to Matthew's assertion, at Brief ¶s 62-63, the probate proceedings only involved *a single question* litigated on April 10, 2018 – "McAllister objects to the appointment of the Petitioners as co-personal representatives." App., p. 85, ¶1.

[¶13] **LAW AND ARGUMENT**

[¶14] **Standard of Review & Oral Argument Request**

[¶15] No court can act without jurisdiction over both the subject-matter of the action and the parties. Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 10, 580 N.W.2d 583.

[¶16] **POINT 1. The district court was without jurisdiction to act.**

[¶17] Invoking N.D.C.C. § 59-10-01(3), Bell Bank indicates it is made "a request for instructions and an action to declare rights", specifically, "a determination of the Trust beneficiaries and approval for distribution of Trust assets to those beneficiaries." Bell Bank's Brief, ¶ 21. Similarly, Matthew argues "Bell Bank filed its Petition for the court to determine the beneficiary of Trust II." Matthew's Brief, ¶65. Each argument fully recognizes the underlying action must be predicated upon *in personam* jurisdiction, and arguments/citations based on *in rem* or *quasi-in-rem* jurisdiction are bogus. Should subject-

matter jurisdiction exist, Bell Bank's petition seeks to invoke a declaratory function ("a judicial remedy") always requiring personal service of a "summons" upon all interested persons – service of process upon the beneficiaries, whether contingent or actual. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. .. But when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-315 (1950). Moreover, standards of fairness and substantial justice govern actions *in rem* as well as *in personam*. *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977). Electronic service on an individual's attorney in another action should never suffice.

[¶18] **A. This district court did not have jurisdiction -lack of service and summons.**

[¶19] Matthew's Brief, at ¶ 75, wrongfully paraphrases N.D.R.Civ.P. 4(b)(4); personal jurisdiction is never conferred "by statute" (probably due to equal protection/due process concepts). N.D.R.Civ.P. 4(d)(2)(A) always requires personal service of the "summons" upon E.M., an individual older than age fourteen (14). Bell Bank wrongfully asserts, at ¶ 24, that Matter of Curtiss A. Hogen Trust B, 2018 ND 117, ¶ 11, 911 N.W.2d 305, has determined that "judicial proceedings can be started through N.D.C.C. § 59-10-01, *without reliance on N.D.C.C. Chapter 32-23*." *Emphasis* added. The case did not so hold; issue not presented.

[¶20] Bell Bank argues, at ¶ 27, Matter of Bieber's Estate, 256 N.W.2d 879, 882 (N.D.

1977) stands for the proposition that "no answer is required by interested person – they cannot be found in 'default' if they fail to respond to a petition seeking judicial intervention in trust administration." The case did not involve a trust, and merely recognized reality – if there is no requirement "to answer or otherwise take affirmative action", no default can occur. That is why there should have been service of a "summons" with its 21 day response requirement – this action is not a probate proceeding. Bell Bank's argument (Brief at ¶s 30-31) and Matthew's argument (Matthew's Brief, ¶s 77-79) of "waiver" is ridiculous. Attorney Garaas objected in writing, and on the record, repeatedly. Appellant's Brief, ¶ 16.

[¶21] The legal hypocrisy of Matthew is made at ¶ 84 of his Brief, claiming N.D.C.C. § 59-10-02(2) provides North Dakota courts with "personal jurisdiction over beneficiaries of trusts administered in North Dakota." The statute only recognizes the existence of personal jurisdiction if the beneficiary has "accept(ed) a distribution from the trust". E.M. is always a beneficiary, but never was he the recipient of any distributions.

[¶22] **B. No doctrine of res judicata or collateral estoppel applies.**

[¶23] If never litigated in the probate court, there can be no reliance upon the doctrines of res judicata or collateral estoppel. The lower court's dicta is not a final judgment.

[¶24] **C. E.M. and his siblings are the only beneficiaries of the Trust[s].**

[¶25] Contrary to Bell Bank's assertion at ¶ 47 of its Brief, and Matthew's similar assertion at ¶ 101, punctuation was added along with identified words, the effect being E.M. went from

a 25% contingent beneficiary[4] (or possibly 33.33%, no wife) into a merely possible beneficiary to the extent Michael "appoint(s) in a valid testamentary instrument that expressly refers to this special power of appointment." App., p. 118. From a "sure thing" to a mere "possibility" by way of illegal modification under the guise of merger.

[¶26] There is no ambiguity in Trust I's terms; Trust I's terms, including the location of the word "and", have legal meanings known to all. See North Dakota citations in Appellant's Brief at ¶ 47. Under the guise of a merger, and with the connivance of Bell Bank, Matthew, and Michelle Tharaldson LeMaster, Michael tried to eliminate his irrevocable gift to his three (3) children – all contrary to law, to include elimination of judicial oversight. N.D.C.C. § 59-12-11(1) or (3). Neither Bell Bank, nor Matthew confine their analysis to the terms of Trust I (or Trust II), instead relying upon extrinsic evidence of Michael's intent. "The parties' intention must be ascertained from the writing alone, if possible. N.D.C.C. § 9-07-04." Blasi v. Bruin E&P Partners, LLC, 2021 ND 86, ¶ 10, 959 N.W.2d 872. Inexplicably, Matthew does not cite, nor distinguish, the three (3) North Dakota cases cited in E.M.'s Brief at ¶ 47, and Bell Bank concedes, at ¶ 51, the legal definition/rule of construction recognized by Narum v. Faxx Foods, Inc., 1999 ND 45, ¶ 20, 590 N.W.2d 454. Matthew's reliance upon some Minnesota State Bar Association's publication, at ¶s 111-113, is unfounded. First, the sample language of § 5.2.5 (App., p. 50) does not correspond to the

[4] Bell Bank recognizes that even Judge McCullough regarded E.M. as a "contingent beneficiary". Bell Bank's Brief, ¶ 42. While the contingency of Trust II did not "come to pass", the single contingency of Trust I did – Michael died, and E.M. should have received 33.33% of the Trust's corpus (because no wife existed).

controverted paragraph found in Trust I (or Trust II). Second, the pertinent power of appointment referenced would have been E.M.'s power of appointment ["exercise by the beneficiary of a special power of appointment"], not Michael's exercise. The remainder of the example, if Michael had used it, actually evidences an intent to first benefit beneficiary E.M.'s descendants, then Michael's other descendants, and if all else failed, as otherwise provided by Michael as Trustor. No omitted children exist (N.D.C.C. § 30.1-06-02), and Trust I always recognized three (3) siblings would each receive one-third (1/3rd) share upon Michael's death (unless there existed a wife and an exercised power of appointment, most likely protecting Michael from a missing prenuptial agreement, or to take advantage of the marital deduction). The "Protective Provision", when originally conceived in 2007 in Trust I, was likely "boilerplate" language protecting three (3) children. Trust II should do the same thing – it was Michael's stated intent to limit his gifts to his descendants, including E.M.

[¶27] **POINT 2. Under the Trust[s], the Trustee must pay E.M.'s guardian's attorney fees.**

[¶28] Under either Trust I or Trust II, a guardian is entitled reimbursement should he "incur personal expense in the support and maintenance" of E.M. Appellant's Brief, ¶ 54.

[¶29] **POINT 3. E.M. was entitled to disqualify Judge Steven E. McCullough.**

[¶30] The lower court fueled the fire, and then struck the match by inserting dicta into a probate court order resulting from a single unrelated issue raised by E.M. – should Bell Bank and Linda M. Tharaldson have been appointed Personal Representatives? App., p. 85. The probate court judge decided to appoint a "third-party corporate entity as personal

representative" (App., p. 100), but inexplicably left the smoldering dicta to be exploited by Bell Bank.

[¶31] The record is void of any probate court determinations affecting either Trust I or Trust II – the terms of Trust I and Trust II were not subject of any probate proceedings, only the duplicity of Trustee Bell Bank in allowing modification under the guise of a merger in violation of law. N.D.C.C. § 59-12-11; always requiring the consent "of all beneficiaries" and the "court" with respect to "noncharitable irrevocable trust(s)". Never litigated, it cannot be the subject of arguments favoring collateral estoppel or res judicata. See Appellant's Brief, ¶s 41-43. Facts are not in dispute; the failure of the Court (1) to accept the law forbidding modification of Trust I's terms without the "consent of all of the beneficiaries", and (2) to understand the language of Trust I based upon its contents is now presented on appeal after only being first heard in these proceedings on December 5, 2019. App., p. 201.

[¶32] **CONCLUSION**

[¶33] Trust I's terms should prevail.

[¶34] Respectfully submitted this 7th day of September, 2021.

/s/ Jonathan T. Garaas

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The above-named counsel certifies this Reply Brief complies with the twelve (12) page limitation imposed by N.D.R.App.P. 32(a)(8)(A).

IN THE SUPREME COURT

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Respondents-Appellees

vs.

E.M., through his guardian, Mark McAllister,

Respondent(s)-Appellant(s).

State of North Dakota

County of Cass

Jonathan T. Garaas, being first duly sworn on oath, deposes and says that Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

1. On the 7th day of September, 2021, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: (1) Reply Brief of Appellant E.M. "Oral Argument Requested". (revised margin/revised contents to meet 12 page limit)

2. The electronically attached documents were served upon the identified lawyer as follows:

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7. To the best of Affiant's knowledge, the electronic address above given was the actual electronic mailing address of the party intended to be so served. The above documents were duly e-mailed (or mailed) in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

/s/ Jonathan T. Garaas
_____
Jonathan T. Garaas

Subscribed and sworn to before me this the 7th day of September, 2021.

/s/ David Garaas & Seal
_____
Notary Public